

**IN THE SUPREME COURT OF INDIA  
CIVIL WRIT JURISDICTION  
WRIT PETITION (CIVIL) NO. 260 OF 2023**

**IN THE MATTER OF:**

**Rituparna Borah & Ors.** ...PETITIONERS

Versus

**Union of India** ...RESPONDENT

**Submissions in brief by Ms. Vrinda Grover on behalf of the Petitioners**

**1. About the Petitioners**

The Petitioners can broadly be divided into two groups:

i. Four queer feminist activists who run a network for queer and trans persons, providing emergency helpline, legal assistance and shelter to LGBTI persons escaping from violent homes.

ii. Petitioners 5 to 10 are three couples where cis-women are in relationships with trans men. They come from marginalised sections of society, and have faced immense natal family violence as well as abuse of legal process.

**2. Prayers in the petition and distinct issues raised herein**

ā) That in order to save the provisions of SMA from being declared *ultra vires*, insofar as they discriminate against adult persons on grounds of sexual orientation and gender identity, **they need to be purposively interpreted to allow for equal legal recognition of non heterosexual marriages.** The submissions made by Dr. Singhvi, Mr. Ramachandran, Mr. Vishwanathan and others are reiterated by the present Petitioners.

- For reference, detailed submissions on this aspect are at Paras 127-199 at Compilation I, Pg. nos. 860-900 (PDF Pg. nos. 863-903) of the Written Submissions filed on record.

**b) Distinct and very crucial issues** which if not addressed while adjudicating on the issue of marriage equality, could have debilitating unintended consequences on the lives of queer and trans persons. Submissions are on the following aspects:

- i. That while subject to this Court awarding recognition of the right to marry under SMA, **this Court must also simultaneously uphold the right to form “chosen families”** in order to protect the right to choice, decisional and associational autonomy, and the right to a life of dignity u/Art. 21 for queer and trans persons.
- ii. That the **Notice-Objections-Domicile** framework of Sec. 5-10 SMA though facially neutral, **has a disproportionate impact on queer and trans persons, who lie on the intersection of various marginalisations, and is thus unconstitutional.** It is also impermissible in view of the doctrine of indirect discrimination.
- iii. The need for *Garima Greh* - **a shelter home and protection regime which is queer and trans sensitive, friendly and contextualised**, in order to facilitate the access to other fundamental rights.

- c) Lastly, the Petitioners adopt the formulation as presented by Mr. Raju Ramachandran with respect to the issue of age of marriage, as well as the proposed reading of SMA provisions using more inclusive terms wherever possible.

### 3. Denial of choice and natal family violence

- a) On 01.04.2023, a **panel hearing** was held on familial violence on queer and trans persons and their implications for “marriage equality” organized by the People’s Union of Civil Liberties (PUCL) and the National Network of LBI Women and Trans Persons. **Testimonies of 31 persons** has been documented, from various states in India, including from people living in semi urban to rural areas. **The full report is part of the record as Compilation II; Documents Vol. V at Pages 1-227**
- b) Natal family violence in the form of physical, verbal, emotional and economic abuse often begins in childhood for queer and trans persons.
- Clothes and hairstyle are the first markers of queer and trans expression, and this receives a lot of familial opposition and violence. **Excerpt of testimony may be read from report at Vol V, Page 124 PDF Page 125**
  - Several queer and trans persons married off at 14; most unfortunate that marriage becomes the garb for corrective rape as a tool of torture. **Excerpt of testimony may be read from report at Vol V, Page 52 PDF Page 53**

- Abduction by family, false cases against partners, beatings – these are routine. Police colludes with natal family and ignores the wishes of adult queer and trans persons. Example: Petitioner No. 7 is currently out on bail and facing prosecution on false allegations of theft and abduction, filed by Petitioner No. 8's parents.

#### 4. Legislative Intent in Recognizing Inter-Religious Marriages Must Guide the Recognition of Queer and Trans Marriages:

- **For ease of reference:** The legislative debates have been excerpted and reproduced in **Pages 864-871** of the written submissions, which are at **Pages 867-874 of the PDF compilation**

The debates bring out the following major themes:

- a) It is **not the legitimate interest of the state to dictate value judgments on whether marriage as an institution must be entered into for procreation, sexual intimacy and/or companionship** and disenfranchise persons for making choices with respect to private and intimate aspects of family life;
- b) **Marriage has time and again evolved as a dynamic institution** to respond to people's aspirations depending on the social, economic, cultural and political changes through time and has witnessed radical transformations in terms of abolition of sati (*Sati Regulation XVII A. D. 1829 of the Bengal Code*), widow remarriage (*The Widow Remarriage Act, 1850*), prohibition of caste (*Hindu Marriage Disabilities Removal Act, 1946* and *The Hindu Marriage Validity Act, 1949*) and religion (*SMA, 1954*) as barriers to marriage,

prevention of child marriage (*The Child Marriage Restraint Act, 1929*), the introduction of monogamy (*Hindu Marriage Act, 1955*), introduction of divorce (*Indian Divorce Act, 1869*), introduction of adoption (*Hindu Adoptions and Maintenance Act, 1956*) and in many other aspects;

- c) **SMA passed to guarantee Article 15 mandate of non-discrimination on religion**: Similarly, SMA must be interpreted to guarantee non-discrimination on SOGI;
- d) It is apparent on the face of the record that **SMA has evolved inspite of objections on basis of scientific knowledge and/or public morality to recognize marriages involving persons who are within prohibited degrees of relationship in 1963, given that custom or usage governing one party allows it**, which were previously deemed unfit for inclusion during passage of the statute in 1954;
- e) **“Law is always speaking”** : The provisions of SMA must not be frozen in the year it was legislated on basis of a literal interpretation, rather, the law must be treated as **“always speaking”** to respond to the claims of Petitioners herein as per the extant law applicable today. As the language of SMA is wide enough to recognize marriages involving queer and trans persons, there is no reason why the law must not be interpreted in such manner (*Dharani Sugars and Chemicals Ltd. v. Union of India, (2019) 5 SCC 480 at paras. 34-38 in Compilation IV: Judicial Precedents, Volume II read at pg. 1627-1630 (PDF pg. 1639-1642); Deepika Singh v. Central*

*Administrative Tribunal, 2022 SCC OnLine SC 1088 at para. 16,  
(at Compilation IV, Vol. I, Pgs. 56-57, PDF Nos. 87-88))*

**5. Mandate of Sec 3: Transgender Persons (Protection of Rights) Act, 2019 necessitates recognition of right to marry to access other rights enumerated therein**

- a) Criminal Tribes Act, 1871 criminalized transgender persons and prohibited guardianship or adoption of minors. However, CTA is repealed in 1949 and there is no bar under Indian law for transgender persons to found a family;
- b) The TG Act mandates the recognition of marriages involving transgender persons by virtue of the inextricable linkages marital status has to the broader range of social and economic rights guaranteed as per law
- c) Section 3 of the TG Act provides that no person or establishment shall discriminate against transgender persons in terms of unfair treatment in employment, healthcare, purchasing or renting property and access to enjoyment of goods, services and facilities dedicated to the use of general public, among other areas. Due to non recognition of their relationships as valid, rampant discrimination is faced by queer and trans persons in housing, healthcare, etc. **Thus, the rights u/Sec. 3 remain as illusory as it were prior to enactment of the law, without legal recognition of non heterosexual marriages.**
- d) **Sec. 3 must be read along with Sec. 20 – full mandate of law requires that SMA be read in a manner consistent with TG Act, as the provisions are in addition to and not in derogation of other laws.**

- e) This Court in *NALSA* did not detain itself to just the issue urged in the petition, but passed positive directions in order to do complete justice. *National Legal Services Authority (NALSA) v. Union of India, (2014) 5 SCC 438 at para. 53*;

## 6. International and comparative law on right to found a family

- a) Principles of law on sexual orientation must progressively engage in a rights discourse to positively advance rights of queer and trans persons (*Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 at paras. 478-479*);
- b) ICESCR General Comment No. 14 and judgments from **Nepal, Taiwan, South Africa, Costa Rica, US and EU** countries are mentioned in the submissions – not being repeated for brevity

## 7. Notice-Domicile-Objection: Sec. 5-10 SMA violate Articles 14, 15, 19 and 21 – intersectionality, heightened vulnerability and indirect discrimination

- a) The *intended consequence* of notice, domicile and objection framework is **prevention of “runaway marriages”**, as borne out from legislative debates (*Lok Sabha Debates on Special Marriage Bill dated 08.09.1954 in Compilation II: Documents, Volume IV at pages 1689 (PDF pg. 1693)*)
- b) **Intersectionality:**
- SOGI *and* caste, religion and class based marginalization renders queer and trans persons vulnerable to widespread

violations as documented in several reports (**Documents and Reports are in *Compilation II, Vol. IV***)

- Notice, domicile, objections framework akin to **perpetuation of ‘order of nature’ under S. 377, IPC, to the derogation of individual liberty, choice and dignity;**
- Court must take into account powerlessness and denial of agency by intersecting marginalizations of SOGI, caste, class and religion. This Hon’ble Court has expounded on this in: ***Patan Jamal Vali v. State of Andhra Pradesh, AIR 2021 SC 2190 at paras. 15-30***)

**c) Indirect Discrimination:**

- The notice, domicile and objection framework does not operate in a vacuum; its implementation must be examined in the social context it operates and the disproportionate impact that even facially neutral laws/practices can create in the real world (***Lt. Col. Nitisha v. Union of India, 2021 SCC Online SC 261 at paras. 58-61, 64-97; Madhu & Anr. v. Northern Railways & Ors., 2018 SCC Online Del 6660 at paras. 16-17, pg. 325-326, PDF pg. 335-336 and 29-30, pg. 329, PDF pg. 339 in Compilation IV: Judicial Precedents, Volume III***)

**d) Doctrine of Proportionality:**

- The means adopted by the notice, domicile and objections framework are grossly invasive of the right to marry and found a family. Not least restrictive measure to attain the legitimate goal of the state. (***Modern Dental College and Research Centre v. State of Madhya Pradesh, (2016) 7 SCC 353; Madhyamam***)



*Broadcasting Limited v. Union of India, 2023 SCC Online SC 366*);

## 8. Recognition of Chosen Families:

### a) Family as a site of caste and gender based control:

- The conceptualization of heterosexual marriage and the consequent family reinforces patriarchy, caste purity, subordination and control of women and perpetuates inequality;
- The demand for marriage equality challenges the foundation of family by procreation and hence the genealogical system of perpetrating caste purity and religious segregation, which advances the vision of Dr. Ambedkar and the Preamble goal of Fraternity and Equality (*Humjinsi: A Resource Book on Lesbian, Gay and Bisexual Rights in India*, Edited and Compiled by Bina Fernandez, India Centre for Human Rights and Law (1999), in *Compilation-II, Documents, Volume IV at pages 799-804 (PDF pg. 803-808)*);
- Natal family violence against trans persons during Covid-19 highlights need for recognition of chosen families in moments of vulnerability (*Report of the Study of Impact of the Covid-19 and Lockdowns on the Transgender Community in Karnataka, Gamana Mahila Samuha (2020) in Compilation-II, Documents, Volume IV at pages 2261 (PDF pg. 2265) and 2271 (PDF pg. 2275)*; Vikramaditya Sahai, Aj Agrawal and Almas Shaikh, 'Exclusion Amplified: COVID-19 and the Transgender Community (CLPR, Bangalore, 2020) in *Compilation-II, Documents, Volume IV at pg. 2954 (PDF pg. 2958)*);

**b) Recognition of Chosen Families in precedents: *To do Complete Justice***

- *NALSA* omnibus directions on self-determination of gender identity, reservation in employment and education, access to healthcare, framing social welfare policies etc.;
- *S. Sushma & Anr. v. Commissioner of Police & Ors., WP No. 7284/2021* - omnibus directions on framing policy under the TG Act, 2019, sensitization of teachers towards queer and gender non conforming children, prohibition of conversion therapy under NMC regulations, develop legal aid services for the community, enlisting of NGOs to provide safe shelter to queer and trans persons. All such directions were passed in a matter seeking protection, to do complete justice.

**c) Chosen Families in Existing Law: Not a radically new concept**

**Legislative:**

- **Adoption:** Hindu Adoptions and Maintenance Act, 1956. The idea of chosen families is already baked into the widely accepted legal conception of family as members related by marriage, blood or *adoption*;
- **Nominated Representative for Mental Healthcare:** S. 14 of MHCA, 2017, r/w Sec. 5(1)(c), permits ‘any individual(s)’ to be appointed as a nominated representative to give effect to the wishes of the patient in their best interests (*Report No. 74, Department-Related Parliamentary Standing Committee on Health and Family Welfare in Compilation-II, Documents, Volume IV at pages 20, 64 (PDF Pg. 24, 68)*);

### **Judicial:**

- **Hijra gharanas:** already a deeply socially ingrained system of chosen families in India and other South Asia cultures (*Illyas v. Badshah alias Kamla, AIR 1990 MP 334 at pages 216-218 of judgment in Compilation IV: Judicial Precedents, Volume III, pg. 239-241 (PDF pg. 249-251); Sweety v. General Public, AIR 2016 HP 148 at paras. 6-15 at pg. 872-863 (PDF pg. 882-883) Compilation IV: Judicial Precedents, Volume III*);
- **Next of Friend:** medical practitioners have a duty to consult family or *next of friend*, in the event patients who are terminally ill have not executed an Advance Directive (*Common Cause v Union of India, (2018) 5 SCC 1 at paras. 198-201; 2023 SCC Online SC 99 at pages 17-18*);

#### **d) Protection of Rights must not hinge on Marital Status:**

- “Atypical families” (*Deepika Singh v. Central Administrative Tribunal, 2022 SCC OnLine SC 1088 at para. 26*);
- Unmarried people have equal decisional autonomy to make decisions to make significant choices regarding their own welfare (*X v. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi, 2022 SCC Online SC 1321 at paras. 40-45*))
- Illustrations of everyday affairs that merit recognition of the role of chosen family members, especially when natal family is unwilling or unavailable to perform traditional role of family members: jail visitation rights, locus in habeas corpus petitions, obtaining transgender identity certificate for mature minors, right to perform last rites, ensuring dignity in death by respecting the identity of the deceased, etc.

**e) International Law Obligation to Recognize Chosen Families:**

➤ **Principle 24 of Yogyakarta Principles:**

mandates that all states must recognize the diversity of family forms, including those not defined by marriage or descent, and take all measures to ensure that no family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members, including but not limited to family-related social welfare and other public benefits

**9. Protection from Violence:**

- a) This Hon'ble Court once again must reiterate *Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273 at paras. 11-13* to prevent unnecessary arrest and unlawful detention of queer and trans persons, who are harassed with false cases of abduction, theft, etc. by natal families.
- b) Preventive, remedial and punitive measures (*Shakti Vahini v. Union of India, (2018) 7 SCC 192, at para. 55*) jointly read with provision of access to safe homes like *Garima Greh* for all queer and trans persons, to be run in partnership with queer and trans sensitive NGOs and networks. (*S. Sushma & Anr. v. Commissioner of Police & Ors., WP No. 7284/2021, orders dated 23.12.2021 at paras. 1-5, pg. 717-743, PDF pg. 727-753, 22.08.2022 at paras. 10-12, pg. 770-771, PDF pg. 780-781) and 09.12.2022 at paras. 20-23, pg. 795-797 (PDF pg. 805-807) of Compilation IV, Vol. III: High Court Cases*);

- 10.**For the assistance of this Hon'ble Court, a glossary on terminology on queer and trans issues is available in the PUCL and National Network of

LBI Women and Trans Persons Report at *Compilation II, Vol. V, at Pgs. 204-215, PDF Nos. 205-216*

11. The prayers in the Petition are reproduced below:

It is therefore, most respectfully prayed that your Lordships may graciously be pleased to:

- a) Issue an appropriate writ, order or direction to declare that the non-recognition of marriage between persons on the basis of sexual orientation and/or gender identity under SMA is illegal and unconstitutional;
- b) Issue an appropriate writ, order or direction to declare the usage of gender neutral terms like ‘spouse’ in the context of solemnization and registration of marriages between LGBTI persons, and all other corresponding provisions under SMA;
- c) Issue an appropriate writ, order or direction to declare that the provisions of law with respect to the “notice, domicile and objection” framework in Sections 5, 6, 7, 8, and 9 of SMA are illegal and unconstitutional;
- d) Issue an appropriate writ, order or direction to declare that the validity of marriages already solemnized or registered under the SMA would not de facto be jeopardized if one spouse transitions to their self-determined gender identity;
- e) Issue an appropriate writ, order or direction to declare and recognise the constitutional right of members of the LGBTI community to have a “chosen family” in lieu of next of kin under all laws, as an intrinsic part of their right to a dignified life under Article 21;
- f) Issue an appropriate writ, order or direction to declare that an unmarried person can nominate ‘any person(s)’ to act as their nominee or next of kin, irrespective of whether such person is a ‘guardian, close relative or family

member', with respect to healthcare decisions in case of incapacity such as execution of Advance Directives and assigning any legal right, interest, title, claim or benefit accrued to the person;

- g) Issue an appropriate writ, order or direction to declare that State Governments must apply all preventive, remedial, protective and punitive measures, including establishment of safe houses similar to the *Garima Greh* welfare scheme, in order to guarantee safety and security of all individuals irrespective of gender identity and sexual orientation;
- h) Issue any other writ, order or direction as this Hon'ble Court may deem fit and proper to do complete justice in the circumstances of the case.

  
**Vrinda Grover, Adv.**

**Date: 25.04.2023**